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Special issue: *Extraterritoriality of EU Law and Human Rights after Lisbon*

Article

## A critique of the extraterritorial obligations of the EU in relation to human rights clauses and social norms in EU free trade agreements

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### Abstract

This article examines the nature of the EU's obligations in relation to human rights and social norms in its free trade agreements (FTAs) with a view to problematising the extent to which such clauses are justiciable and enforceable. While human rights do not fall within the area of exclusive EU competence, it is widely accepted that the EU may be liable for contributing to human rights violations in the context of trade agreements under international law and EU law. Conversely, it will be shown that social norms, including labour standards and principles such as sustainable development and environmental protection, which are increasingly set out in the Trade and Sustainable Development (TSD) chapters of FTAs, raise more complex questions regarding the territorial reach of EU law. It is submitted that EU FTAs are constructed in such a way as to exclude rights with the effect that the extraterritorial obligations of the EU in relation to human rights clauses and social norms are unlikely to be judicially enforceable in practice. However, in spite of the territorial limitations of EU law in relation to human rights clause and social norms, recent developments in the case law of the Court of Justice of the EU (CJEU) suggest that the EU is nevertheless under an obligation to ensure its trade agreements with developing countries are conducted in a 'development-friendly' manner. To conclude, this article advances the argument that the obligation to engage in 'development-friendly' trade may serve to extend the territorial reach of EU further, albeit within the confines of trade and cooperation agreements.

**Keywords:** human rights; free trade agreements; development; extraterritoriality

## 1. Introduction

As the world's largest trading bloc and the second largest economy, the European Union (EU) has established itself as a significant market power<sup>1</sup> in the global trading system and its global reach has been expanded through an increasingly complex web of free trade agreements (FTAs). While the EU's external trade policy seeks to maintain high regulatory standards, achieving broader social objectives remains central to the overall trade philosophy.<sup>2</sup> Respect for human rights is a founding value or 'constitutive norm'<sup>3</sup> of the EU as reaffirmed by the Lisbon Treaty (2009). As a regional actor, the EU has sought to inject a social dimension into its external trade relations since the early 1990s, through the inclusion of social clauses in its FTAs.<sup>4</sup> However, the promotion of values is not limited to so-called universal<sup>5</sup> human rights. It also includes other 'social norms',<sup>6</sup> such as labour standards and objectives to uphold the rule of law, good governance and to pursue policies that promote sustainable development and protection of the environment.

Over the past two decades, the EU has increasingly recognised the importance of promoting robust social policies as a response to globalisation, and its constitutive values have been embedded through its external trade relations. The EU is now characterised as a normative power<sup>7</sup> which 'changes the norms, standards and prescriptions of world politics away from the bounded experience of state-centricity',<sup>8</sup> and this conceptualisation has profound implications for our understanding of how the EU seeks to use FTAs as part of its external trade policy. Bilateral and regional trade agreements constitute a significant part of the EU's trade policy and if all current negotiations were concluded, they could cover almost two-thirds of EU trade.<sup>9</sup> FTAs are, therefore, seen to be an important mechanism for 'harnessing globalisation'<sup>10</sup> with the aim of reconciling the 'means of globalisation... with its ends'<sup>11</sup> or, in other words, ensuring that the opening of markets and advancements in technology enhances the capabilities and well-being of

<sup>1</sup>C Damro, 'Market Power Europe' (2012) 19 *Journal of European Public Policy* 682.

<sup>2</sup>C Malmström, 'Values in EU Trade Policy – Targeting Corruption' (4th OECD Integrity Forum, Paris, 19 April 2016) <[http://trade.ec.europa.eu/doclib/docs/2016/april/tradoc\\_154461.pdf](http://trade.ec.europa.eu/doclib/docs/2016/april/tradoc_154461.pdf)>.

<sup>3</sup>M Hirsch, 'Identity Matters: The Enforcement of Global Human Rights Treaties by European Union's Trade Instruments' (2016) Hebrew University Studies Research Paper Series, No. 04-6, 14; S Khorana and M Garcia, 'European-India Trade Negotiations: One Step Forward, One Back?' (2013) 51 *JCMS* 684; A Van de Hoven, 'European Union Regulatory Capitalism and Multilateral Trade Negotiations' in S Lucarelli and I Manners (eds), *Values and Principles in European Union Foreign Policy* (Routledge 2006).

<sup>4</sup>See S Velluti, 'The Promotion and Integration of Human Rights in EU External Relations' (2016) 32 *Utrecht Journal of International and European Law* 41 and L Bartels, 'The European Parliament's Role in Relation to Human Rights in Trade and Investment Agreements' (Directorate-General for External Policies Study, European Parliament, February 2014, PE 433.751).

<sup>5</sup>The extent to which the rights laid down in the Universal Declaration of Human Rights are universal is contested. See M Freeman, *Human Rights* (Polity Press 2017); J Donnelly, *Universal Human Rights in Theory and Practice* (3rd edn, Cornell University Press 2013); A An-Na'im, *Islam and Human Rights: Selected Essays of Abdullahi An-Na'im* (M A Baderin ed, Routledge 2010); D Otto, 'Rethinking the Universality of Human Rights Law' (1997) 29 *Columbia Human Rights Law Review* 1; C Brown, 'Universal Human Rights: A Critique' (1997) 1 *The International Journal of Human Rights* 41.

<sup>6</sup>Scholarship rooted in the Normative Power Europe approach uses the terms 'norms', 'rules', 'principles' and 'standards' interchangeably. For the purposes of this article, the term 'social norm' reflects those values, principles and standards that are constituted through the legislation of the EU and deemed to reflect the fundamental, or founding, values of the Union.

<sup>7</sup>Ian Manners, the scholar who originally coined the term 'normative power Europe' defines normative power as 'the ability to define what passes as "normal" in world politics'. See, I Manners, 'Normative Power Europe: A Contradiction in Terms?' (2002) 40 *JCMS* 235. For a critique of the normative influence of the EU through FTAs, see: L McKenzie and KL Meissner, 'Human Rights Conditionality in European Union Trade Negotiations: The Case of the EU-Singapore FTA' (2017) 55 *JCMS* 837; Velluti (n 4) M Garcia and A Masselot, 'EU-Asia Free Trade Agreements as Tools for Social Norm/Legislation Transfer' (2015) 13 *Asia Europe Journal* 241; D Sicurelli, 'The EU as a Promoter of Human Rights in Bilateral Trade Agreements: The Case of Negotiations with Vietnam' (2015) 11 *Journal of Contemporary European Research* 230.

<sup>8</sup>I Manners, 'The Normative Ethics of the European Union' (2008) 84 *International Affairs* 45.

<sup>9</sup>Commission, *Trade for All: Towards a More Responsible Trade and Investment Policy* (October 2015) <[http://trade.ec.europa.eu/doclib/docs/2015/october/tradoc\\_153846.pdf](http://trade.ec.europa.eu/doclib/docs/2015/october/tradoc_153846.pdf)>.

<sup>10</sup>Commission, 'Report on the Implementation of the Trade Policy Strategy Trade for All: Delivering a Progressive Trade Policy to Harness Globalisation', Report from the European Commission to the European Parliament, the Council, the European Economic and Social Committee, and the Committee of the Regions COM (2017) 491 final of 13 September 2017.

<sup>11</sup>Commission, 'Reflection Paper on Harnessing Globalisation' COM (2017) 240 of 10 May 2017 at p13. <[https://ec.europa.eu/commission/sites/beta-political/files/reflection-paper-globalisation\\_en.pdf](https://ec.europa.eu/commission/sites/beta-political/files/reflection-paper-globalisation_en.pdf)> accessed on 13 January 2018.

individuals globally. Through its external policies, the EU has universalised human rights standards<sup>12</sup> and social norms and has effectively projected an image of itself as a ‘formidable force for good’.<sup>13</sup>

This article examines the territorial reach and limitations of EU law and international law in relation to human rights clauses and social norms in EU FTAs. Section 2 discusses the nature of EU obligations in relation to human rights clauses and argues that, while human rights do not fall within the area of exclusive EU competence, it is widely accepted that the EU may be liable for contributing to human rights violations in the context of trade agreements under international law and EU law.<sup>14</sup> Section 3 examines the EU’s obligations in relation to other policies with extraterritorial effects, namely, the social norms set out in Trade and Sustainable Development (TSD) chapters of EU FTAs. It will be shown that social norms raise more complex questions regarding the territorial reach of EU law. Section 4 examines dispute settlement provisions within EU FTAs and argues that the EU’s trade agreements are constructed in a way that excludes rights. Section 5 explores recent developments in EU law<sup>15</sup> that support the proposition that the EU is under an obligation to ensure its trade agreements with developing countries are conducted in a ‘development-friendly’ manner. While the precise nature of this obligation is not certain, it is concluded that the obligation for ‘development-friendly’ trade appears to extend the territorial reach of EU law further, at least in the context of trade and development agreements. A critical assessment of the obligations of the EU in relation to human rights clauses and social norms contained within FTAs provides important insights into the evolving processes associated with globalisation, the relationship between international law and EU law and the way in which the EU may shape international law. This chapter aims to show that when negotiating FTAs, it is profoundly important to consider the way in which implementation of the trade agreement may affect the human rights of persons outside the territory of the EU.

## 2. EU obligations in relation to human rights clauses in FTAs

‘Human rights’ refer to a spectrum of rights, some of which may have peremptory status in international law.<sup>16</sup> Rights may derive their authority from treaty law, general principles of international law or customary law,<sup>17</sup> and the nature of the right may be peremptory or *erga omnes*.<sup>18</sup> Rights expressed through the international and constitutional legal frameworks are binding, although by their nature they may be non-derogable or derogable.<sup>19</sup> From the international law perspective, human rights have thus far been conceptualised as conferring entitlements, duties and obligations through a state-centric relational model.

<sup>12</sup>The human rights standards the EU embeds within its internal and external policies are referred to as ‘universal’ as they are enshrined in the United Nations Universal Declaration of Human Rights (UDHR). See, UN General Assembly, ‘Universal Declaration of Human Rights’ United Nations (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR), Paris 1948).

<sup>13</sup>C Malmström, ‘European Trade Policy at a Crossroads’ (Speech at the European Trade Policy at a Crossroads Conference, Milan, 18 November 2016) <[http://trade.ec.europa.eu/doclib/cfm/doclib\\_section.cfm?sec=733](http://trade.ec.europa.eu/doclib/cfm/doclib_section.cfm?sec=733)> accessed 18 April 2017.

<sup>14</sup>For a thorough and excellent account of this position, see: L Bartels, ‘The EU’s Human Rights Obligations in Relation to Policies with Extraterritorial Effects’ (2014) 25(4) *EJIL* 1071.

<sup>15</sup>Case C-377/12, *Commission v Council* [2104] ECLI:EU:C:2014:1903 (EU-Philippines FTA).

<sup>16</sup>A peremptory norm of international law is defined by art 53 Vienna Convention on the Law of Treaties (VCLT) as ‘a norm accepted and recognised by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character’. VCLT art 64 provides that ‘If a new peremptory norm of international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates.’

<sup>17</sup>T Meron (ed), *Human Rights in International Law: Legal and Policy Issues* (vol 1, Clarendon, 1986) 133.

<sup>18</sup>There is a fine distinction between peremptory norms and obligations *erga omnes*, a distinction that is often conflated and overlooked in international legal scholarship. For a comprehensive historical account of the origins of these concepts, and their operation in different contexts, see: P Picone, ‘The Distinction between Jus Cogens and Obligations Erga Omnes’ in E Cannizzaro (ed), *The Law of Treaties Beyond the Vienna Convention* (OUP 2011).

<sup>19</sup>Understanding the legal and normative foundations of human rights is particularly significant as rights are invoked in different settings. See: B Simma and P Alston, ‘The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles’ (1988) 12 *Australian Yearbook of International Law* 82. There is some debate as to how rights are prioritised where a conflict arises between rights secured at both the constitutional and international level. See: E Benvenisti and A Harel, ‘Embracing the Tension between National and International Human Rights Law: The Case for Discordant Parity’ (2017) *International Journal of Constitutional Law* 36.

At the EU level there is a clear divergence between the exclusive competence of the EU to act in trade, through its common commercial policy,<sup>20</sup> and human rights, where there is no exclusive competence to act.<sup>21</sup> As a result, the EU does not have a coherent external human rights policy or a mechanism for which it, as a *regional* actor and not a *state* actor, can be held accountable for any breach.<sup>22</sup> The EU, while not a state, is an international organisation in the ordinary sense, in that it has been established by international treaties, is a subject of international law and it is a *sui generis* international organisation that has ‘an autonomous legal order’.<sup>23</sup> Consequently, the EU may be held accountable for violations of human rights committed extraterritorially and those arising from the extraterritorial effects of its external policies. Linking trade with human rights compliance is expressed in law and justified on the normative basis that the EU *should* act to extend its values, standards and principles through its external action.<sup>24</sup> The Lisbon Treaty expressly provides that the EU should respect the human rights of persons outside of its territory both in relation to its extraterritorial conduct and its policies that have extraterritorial effects. In Article 2 Treaty on the European Union (TEU), the constitutive norms of the Union are identified as the ‘respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights’. Building on this normative base, the EU’s competence to embed liberal economic values and social norms through its internal and external actions is constituted through the legal bases of Article 3 TEU and Article 21 TEU. Article 3(5) TEU provides that the EU ‘shall uphold and promote its values and interests’ in its relations with the wider world. Further, it provides that the EU shall ‘contribute to ... free and fair trade, eradication of poverty, and the protection of human rights ...’ in its external relations. Article 21(1) TEU, which states that the EU’s external action ‘shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world’, complements Article 3(5). Furthermore, Article 21(3) TEU reinforces that the EU ‘shall respect the principles and pursue the objectives’ set out in Article 3(5) and Article 21 TEU, but also encompasses ‘the external aspects of other policies’.<sup>25</sup> Article 21(3) TEU is, therefore, ‘normatively stronger’ than Article 3(5) as it also relates to the ‘external aspects of the EU’s internal policies’.<sup>26</sup>

However, the Lisbon Treaty does not provide a prescriptive framework for the realisation or implementation of these objectives or principles. While there are certainly subtle differences in the linguistic construction of Article 3(5) TEU and Article 21(1) TEU, both serve to constrain the external actions of the EU in its relationship with third countries.<sup>27</sup> As noted by Lorand Bartels, the EU is not under a positive obligation to ‘protect persons located extraterritorially from the acts of EU businesses’ or to ‘provide development aid to developing countries in order to fulfil their human rights’.<sup>28</sup> However, the thrust of Article 3 and Article 21 TEU is that the EU *should* act in a way that pursues these objectives in its external actions and external aspects of its other policies. Indeed, the EU appears to project its missionary objectives through its external trade policy. For example, in 2015 the EU introduced its new ‘responsible’

<sup>20</sup>Treaty on the Functioning of the European Union (TFEU) art 207.

<sup>21</sup>A significant and progressive step was made when the EU joined the multilateral human rights treaty, the Convention on the Rights of Persons with Disabilities, which was ratified in 2010.

<sup>22</sup>Velluti (n 4).

<sup>23</sup>This is a longstanding characterisation of the EU, recently reiterated in the view of Advocate General Kokott in Opinion 2/13 ‘Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms’ [2014] ECLI:EU:C:2014:2454.

<sup>24</sup>Manners (n 7) identifies three aspects of the EU’s normative power: ‘[there is] an ontological quality to it – that the EU can be conceptualised as a *changer* of norms in the international system; a positivist quality to it – that the EU *acts to change* norms in the international system; and a normative quality to it – that the EU *should act* to extend its norms into the international system.’ For a critique of this theory, see: U Staeger, ‘African-EU Relations and Normative Power Europe: A Decolonial Pan-African Critique’ (2016) 36 *JCMS* 981.

<sup>25</sup>TEU art 21(3) states: ‘The Union shall respect the principles and pursue the objectives set out in paragraphs 1 and 2 in the development and implementation of the different areas of the Union’s external action covered by this Title and by Part Five of the Treaty on the Functioning of the European Union, and of the external aspects of its other policies.’

<sup>26</sup>L Bartels, ‘The EU’s Human Rights Obligations in Relation to Policies with Extraterritorial Effects’ (2014) *EJIL* 25(4), 1074.

<sup>27</sup>TEU art 3(5) provides that the ‘Union *shall uphold and promote* its values and interests’ while TEU art 21(1) states that the ‘Union’s action on the international scene *shall be guided by* the principles that have inspired its own creation’ (emphasis added). Bartels argues that the ‘softer’ language of TEU art 21(1) nevertheless curtails the EU’s action with third countries. See Bartels (n 30).

<sup>28</sup>Bartels (30) 1075.



trade policy, *Trade for All*, which both envisages the liberalisation of trade within a rights framework<sup>29</sup> and identifies FTAs as ‘levers to promote, around the world, values like sustainable development [and] human rights’.<sup>30</sup>

Moshe Hirsch submits that the EU’s conceptualisation of FTAs as a mechanism through which compliance with human rights standards and social norms can be achieved is significantly motivated by its *collective* identity and its perceived role as a human rights promoter.<sup>31</sup> For example, an early attempt to maximise the ‘collective influence’ was evident in the intergovernmental European Political Cooperation (EPC), which had the aim, among other things, of promoting respect for human rights in relations with third countries and the 12 European Community states:

The Twelve make every effort to promote and protect human rights and fundamental freedoms: when abuses occur, they often intervene with other governments to *underline European concerns* and press for full respect for human rights.<sup>32</sup>

As a regional actor, the first iteration of a social clause in an EU trade and cooperation agreement can be traced back to the Lomé IV Convention, with Article 5(1) advocating a ‘human-centred’ conception of development, wherein the individual is ‘the main protagonist and beneficiary of development’. This provision underscored the EU’s ‘positive approach’ to development, where ‘respect for human rights is recognised as a basic factor of real development and where cooperation is conceived as a contribution to the promotion of these rights’. Significantly, the parties to the Convention identified ‘respect for human rights, democratic principles and the rule of law’ as an ‘essential element’ of the trade and development cooperation agreement.<sup>33</sup> The underlying rationale for the inclusion of this clause was the EU’s increasing concern that there existed no legal mechanism through which trade and development concessions could be suspended on the occurrence of a flagrant violation of human rights by any of its trade partners.<sup>34</sup>

That human rights are constitutive norms of the EU and central to its identity in the international community is evident through the statements of the EU’s institutions. For example, the European External Action Service (EEAS) has described human rights as the ‘silver thread’ running through all of the EU’s external actions.<sup>35</sup> Similarly, the Council has identified the promotion and safeguarding of human rights as a legitimate duty and in 2012 adopted the *Strategic Framework on Human Rights and Democracy* and its associated Action Plan,<sup>36</sup> encouraging the EU’s institutions to adopt a more coherent approach to the mainstreaming of rights. In legal terms, the EU’s constitutive values are not only expressed through the Treaty of Lisbon and earlier EU constitutional documents, but also through the European Charter of Fundamental Rights (CFR). The CFR is comprised of six areas of rights protection relating to human dignity, freedom, equality, solidarity, citizens’ rights and justice and entrenches rights and freedoms in the Union.<sup>37</sup> Creating an ‘ever closer union’ based on ‘common values’, the Charter seeks to strengthen the protection of individual fundamental rights and freedoms for citizens within the EU, placing the ‘individual at the heart of its activities ... and ... creating an area of freedom, security and justice’.<sup>38</sup>

<sup>29</sup>Commission (n 11).

<sup>30</sup>C Malmström, ‘Foreword’ in *Trade For All – Towards A More Responsible Trade and Investment Policy* (European Commission October 2015) <[http://trade.ec.europa.eu/doclib/docs/2015/october/tradoc\\_153846.pdf](http://trade.ec.europa.eu/doclib/docs/2015/october/tradoc_153846.pdf)> accessed 10 November 2017.

<sup>31</sup>Hirsch (n 3).

<sup>32</sup>European Political Cooperation (Luxembourg 1988) 12.

<sup>33</sup>Lomé IV Convention art 5 states, in part: ‘Respect for human rights, democratic principles and the rule of law, which underpins relations between the ACP States and the Community and all provisions of the Convention, and governs the domestic and international policies of the Contracting Parties, shall constitute an essential element of this Convention.’

<sup>34</sup>L Bartels, ‘The European Parliament’s Role in Relation to Human Rights in Trade and Investment Agreements’ European Parliament, Directorate-General for External Policies Study (February 2014) PE 433.751

<sup>35</sup>European Parliament, ‘Human Rights – a Silver Thread through All External Policies’ (Press Release, 16 December 2010) <<http://www.europarl.europa.eu/news/en/news-room/20101215IPR10432/human-rights-a-silver-thread-through-all-external-policies>> accessed 17 April 2018.

<sup>36</sup>Council of the European Union, ‘EU Strategic Framework on Human Rights and Democracy’ (Luxembourg 25 June 2012) 11855/1212 (Strategic Framework).

<sup>37</sup>Charter of Fundamental Rights of the European Union OJ. C. 326/392 of 26 October 2012 (Charter of Fundamental Rights).

<sup>38</sup>Recitals 1–4 of the Preamble, Charter of Fundamental Rights [emphasis added].

Although the EU has implemented laws that promote and protect human rights, these are not as extensive as those undertaken by the Member States at the constitutional level and under international law. Indeed, it is the peculiarity of the EU as a cosmopolitan order, rather than a State, that has resulted in the emergence of a two-tier system of rights protection, where a narrower range of rights is afforded protection by the EU through the CFR than the rights protected by the individual Member States. The legal framework of the EU ‘assigns a more circumscribed role to human rights within the context of internally focused EU policies and the dominant focus is external, empowering and even obliging the EU to actively promote human rights in its international policies’.<sup>39</sup> It is the two-tier system that ‘strikes at the heart of the principle of universality on which human rights rest both legally and conceptually’<sup>40</sup> and reveals the hypocrisy of the EU as a normative actor that rhetorically promotes universal values but in reality curtails the extent to which such universal values are protected.

## 2.1. Extraterritorial effects of human rights obligations in EU FTAs

The development of social policy, both internally and externally, by the EU has been an evolutive process spanning many decades and, in some instances, the CJEU has found that the economic aims of the Union may be ‘secondary’ to its social aims.<sup>41</sup> However, even though the relationship between trade and development has become ‘progressively stronger’,<sup>42</sup> the jurisprudence on the interrelationship between trade and development and trade and human rights, is extremely limited. Only two cases have addressed the potential legal consequences and extraterritorial effects of human rights clauses in EU FTAs.

In the first case, *Portugal v Council*,<sup>43</sup> the exclusive competence of the EU to conclude a trade and cooperation agreement with India, which contained a human rights clause,<sup>44</sup> was challenged. As there is no exclusive EU competence relating to human rights, Portugal sought the annulment of the agreement on the grounds that the conclusion of the agreement by the EU institutions was ultra vires. The most interesting analysis of this case is found in the Opinion of Advocate General La Pergola, who articulated development as a ‘complex vision’ that is ‘the product of interaction between its economic, social and political aspects’.<sup>45</sup> On the nature of ex Article 130(u) Maastricht Treaty (development cooperation, now governed by Article 208 TFEU), La Pergola stated that the failure to include a democracy clause in the cooperation agreement would not only undermine compliance with the legal requirements of ex Article 130(u) Maastricht Treaty, but would ‘compromise the legality of Community action’. Reinforcing this point, the Court found that human rights violations ‘may be, amongst other things, an important factor for the exercise of the right to have a development cooperation agreement suspended or terminated’.<sup>46</sup> However, the Court did not consider the extraterritorial application of human rights clauses, but merely impressed upon the EU the importance of including particular clauses to ensure compliance with primary obligations set out in the treaties.

More recently, in 2016, the relationship between trade and human rights was called into question, albeit tangentially, in the case of *Front Polisario*.<sup>47</sup> This case concerned the applicability of the EU’s Association Agreement with Morocco<sup>48</sup> to the disputed territory of Western Sahara. Front Polisario, a

<sup>39</sup>Hirsch (n 3) 19.

<sup>40</sup>UNOCHR Regional Office for Europe, ‘Report on the European Union and International Human Rights Law’ [undated] 8. <[www.europe.ohchr.org/EN/Publications/Pages/Publications.aspx](http://www.europe.ohchr.org/EN/Publications/Pages/Publications.aspx)> accessed 18 April 2018.

<sup>41</sup>Joined Cases C-270/97 and C-271/97, *Deutsche Post AG v Elizabeth Sievers & Brunhilde Schrage* ECLI:EU:2000:76 of 10 February 2000.

<sup>42</sup>Case 45/86 *Commission v Council (re GSP)* [1987] ECR 1493, para 17.

<sup>43</sup>Case C-268/94 *Portugal v Council* [1996] ECR I-6219.

<sup>44</sup>As noted by L Bartels, the human rights clause in this case is not representative of human rights clauses in more recent EU-FTAs. See L Bartels, ‘Human Rights and Sustainable Development Obligations in EU Free Trade Agreements’ (2012) *University of Cambridge Legal Studies Research Paper Series* No 24/2012, 4.

<sup>45</sup>Case C-268/94 *Portugal v Council* [1996] ECR I-6219, Opinion of Advocate General La Pergola, para 13.

<sup>46</sup>Case C-268/94 (n 47) para 27.

<sup>47</sup>Case C-104/16 P, *Council v Front Polisario* [2016] ECLI:EU:C:2016:973.

<sup>48</sup>The Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the Kingdom of Morocco, of the other part (EU-Morocco Association Agreement) OJ 2000 L 70 concluded on 26 February 1996 and amendments made to that Agreement, including an Exchange of Letters on reciprocal liberalisation measures on agricultural products, processed agricultural products, fish, and fishery products concluded on 8 March

national liberation movement that controls a small part of Western Sahara, sought to annul the Agreement insofar as it applied to the territory of Western Sahara. In its claim, Front Polisario argued that the extension of the agreement to the disputed territory of Western Sahara was unlawful on the basis that the EU could not ensure that implementation of the Agreement would not be ‘carried out in a manner detrimental to the population of [Western Sahara] and did not entail infringements of fundamental rights of the persons concerned’.<sup>49</sup> Before the General Court, Front Polisario sought the annulment of the Agreement as it applied to Western Sahara and claimed that its application to this territory constituted a violation of the EU’s obligations under the CFR and under international law.

On examining the scope of the Agreement, the General Court identified the importance of conducting an impact assessment<sup>50</sup> before the negotiation and implementation of an agreement to ensure that progressive liberalisation would not result in the violation of fundamental rights, including the rights to human dignity, to life and to the integrity of the person,<sup>51</sup> the prohibition of slavery and forced labour,<sup>52</sup> the freedom to choose an occupation and right to engage in work,<sup>53</sup> the freedom to conduct a business,<sup>54</sup> the right to property,<sup>55</sup> the right to fair and just working conditions and the prohibition of child labour and protection of young people at work.<sup>56</sup> This demonstrates a progressive approach and one that incorporates respect for civil and political rights, as well as economic, social and collective rights. Furthermore, in this case, the Court agreed with the Council’s argument that the EU and its institutions cannot be held accountable for the infringement of fundamental rights committed by a non-member, but nevertheless found that this approach ‘ignores the fact that, if the European Union allows the export to its Member States of products originating in that other country which have been produced or obtained in conditions which do not respect the fundamental rights of the population of the territory from which they originate, it may indirectly encourage such infringements or profit from them’.<sup>57</sup> Reinforcing the EU’s purported ethic of responsibility, the Court at first instance ordered the annulment of the agreement to the extent that it applied to Western Sahara, marking a significant shift in the willingness of the Court to intervene in trade matters. Geraldo Vidigal argues that the decision of the General Court could be interpreted as recognising a ‘weak’ duty of the EU institutions to ensure that the trade agreement itself is not a violation of fundamental rights and a ‘strong’ duty to ensure that the EU institutions, through the implementation of the agreement, do not ‘indirectly encourage’ violations of fundamental rights nor do they ‘benefit’ from them.<sup>58</sup> However, the obligation to conduct an impact assessment remains procedural and there is certainly a duty on the part of EU institutions to ensure that these have been carried out carefully and impartially.

On appeal to the CJEU and in the Opinion of Advocate General Wathelet, it was acknowledged that fundamental rights may have extraterritorial effects, particularly ‘where an activity is governed by EU law and carried out under the effective control of the EU and/or its Member States but outside their territory’.<sup>59</sup> While the Advocate General believed the General Court to have erred in applying the CFR

2012 pursuant to Council Decision 2012/497.

<sup>49</sup>Case C-104/16 P (n5 1) para 47.

<sup>50</sup>Case T-512/12, *Front Polisario v Council* [2015] ECLI:EU:T:2015:953, para 228. The importance of conducting human rights impact assessments has also been acknowledged by the European Ombudsman in relation to the EU-Vietnam FTA, where the Commission’s failure to provide valid reasons justifying its refusal to conduct an impact assessment was deemed to constitute maladministration. See ‘European Ombudsman’s Decision on the failure of European Commission to conduct a prior human rights impact assessment of the Vietnam free trade agreement’ (3 March 2016) <[www.ombudsman.europa.eu/en/activities/speech.faces/en/64453/html.bookmark](http://www.ombudsman.europa.eu/en/activities/speech.faces/en/64453/html.bookmark)> accessed 15 January 2018.

<sup>51</sup>Charter of Fundamental Rights, arts 1–3.

<sup>52</sup>*ibid*, art 5.

<sup>53</sup>*ibid*, art 15.

<sup>54</sup>*ibid*, art 16.

<sup>55</sup>*ibid*, art 17.

<sup>56</sup>*ibid*, arts 31 and 32.

<sup>57</sup>Case T-512/12 (n 55) 231.

<sup>58</sup>G Vidigal ‘Trade Agreements, EU Law, and Occupied Territories (2): The General Court Judgment in *Frente Polisario v Council* and the Protection of Fundamental Rights Abroad’ *EJIL:Talk!* 11 December 2011 <[www.ejiltalk.org/13901-2/](http://www.ejiltalk.org/13901-2/)> accessed 20 April 2018.

<sup>59</sup>Case C-104/16 P *Council v Front Polisario* ECLI:EU:C:2016:677, Opinion of Advocate General Wathelet, para 270.



extraterritorially to Western Sahara,<sup>60</sup> he disputed the Council's claim that human rights in third countries are merely of political concern to the EU and confirmed that the EU and its institutions 'must respect international law in the exercise of its powers'.<sup>61</sup> However, the CJEU found that *Front Polisario* did not satisfy the requirements for standing under EU law and, therefore, the case was deemed to be inadmissible. Consequently, the CJEU did not determine whether part of a trade agreement could be annulled on the basis that its implementation might interfere with the human rights of persons outside EU territory.<sup>62</sup> Nevertheless, the *Front Polisario* case confirms that the EU and its institutions may incur non-contractual liability<sup>63</sup> for contributing to human rights violations extraterritorially, even where such a violation takes place by a third party against a third party.<sup>64</sup>

### 3. EU obligations in relation to social norms

In addition to human rights clauses, FTAs also refer to a broad spectrum of social norms, including commitments to labour standards and the pursuit of objectives such as upholding the rule of law, good governance and sustainable development. The legal effect of social norms, which are increasingly contained within Trade and Sustainable Development (TSD) chapters of EU FTAs, is not certain and raises interesting questions relating to the territorial reach of EU law.

#### 3.1. Labour standards in FTAs

Linking trade with social concerns is not a new phenomenon, although the depth and coverage of commitments has changed over time. At the World Trade Organization (WTO), an early attempt to include a 'social clause' in the WTO's Singapore Declaration (1996), which would see the linkage of trade and labour standards in the multilateral framework, was rejected.<sup>65</sup> Over the past two decades, the EU has attempted to incorporate labour standards through its trade agreements and while there is variance in the scope of labour standards in each agreement, a 'widening and deepening' of labour provisions has been observed across EU FTAs since the mid2000s.<sup>66</sup> Early iterations of labour standards in EU trade agreements, like the EU-Chile FTA of 2003, advanced the EU's ethos that social development must go 'hand in hand' with economic development, but labour standards were expressed as non-binding commitments and the agreement did not include a mechanism for their enforcement.<sup>67</sup> By contrast, labour standards under new-generation FTAs are more expansive, as illustrated by the EU-Korea FTA, which provides that each party has the right to determine its own levels of environmental and labour protection but 'shall seek to ensure that those laws and policies provide for and encourage high levels of environmental and labour protection, consistent with internationally recognised standards or agreements'.<sup>68</sup> New-generation

<sup>60</sup>*ibid.*, para 272.

<sup>61</sup>*ibid.*, para 256.

<sup>62</sup>This is a notable criticism of the case. The Court's heavy focus on the self-determination aspect of this case and its failure to offer an analysis of the application of human rights law to trade agreements is considered by some scholars to be a missed opportunity. See M Ghering, 'EU/Morocco Relations and the Western Sahara: The ECJ and International Law' (*EU Law Analysis*, 23 December 2016) <<http://eulawanalysis.blogspot.co.uk/2016/12/eumorocco-relations-and-western-sahara.html>> accessed 10 April 2018.

<sup>63</sup>To establish non-contractual liability under Art 340(2) TFEU, three conditions must be established: that the conduct of the EU institution is unlawful; that actual damage is suffered by the applicant; and that there is a causal link between the unlawful act and the damage suffered. See Case T-69/00 *FIAMM and FIAMM Technologies* [2005] ECR II-5393, para 85, and the case law cited.

<sup>64</sup>Case T-292/09 *Mugraby v Council and Commission* [2011] ECR II-255 (General Court Order of 6 September 2011). The subsequent appeal was dismissed in Case C-581/11 P *Mugraby v Council and Commission* ECLI:EU:C:2012:466 (Order of the Fifth Chamber of 12 July 2012).

<sup>65</sup>V Leary, 'The WTO and the Social Clause: Post-Singapore' (1997) 8(1) *EJIL* 118–22.

<sup>66</sup>L van den Putte and J Orbie, 'EU Bilateral Trade Agreements and the Surprising Rise of Labour Provisions' (2015) 31(3) *The International Journal of Comparative Labour Law and Industrial Relations* 265.

<sup>67</sup>Agreement establishing and association between the European Community and its Member States and the Republic of Chile (adopted 30 December 2002, entered into force February 2003) (EU-Chile FTA), art 44(1).

<sup>68</sup>Free Trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part OJ L127/7 provisionally applied in July 2011 and formally ratified in December 2015 (EU-Korea FTA), Art 13.3.

FTAs typically include a commitment to respect core labour standards as human rights,<sup>69</sup> and the EU-Korea FTA, which has served as a template for more recent EU FTAs, identifies core labour standards as four fundamental labour rights.<sup>70</sup> Furthermore, it makes explicit reference to the International Labour Organization's (ILO) Decent Work Agenda, the language of which is now commonplace in other EU FTAs, including the 'deep and comprehensive' FTAs with Moldova, Georgia and Ukraine.<sup>71</sup>

TSD chapters typically have a tripartite framework consisting of substantive standards, procedural commitments and institutional mechanisms.<sup>72</sup> The substantive standards typically consist of 'minimum obligations' that implement multilateral obligations like the core standards of the ILO and the decent work agenda and other obligations that require a *de minimis* level of protection, while encouraging the parties to raise their levels of protection, provided that doing so is not a disguised attempt at protectionism.<sup>73</sup> Recently, the EU has sought to adopt a 'gender-sensitive' approach to its trade agreements, with the Strategic Partnership Agreement accompanying the EU-Japan FTA expected to provide a significant gender component to the labour provisions in the FTA. The incorporation of gender into EU-FTAs, particularly in relation to labour provisions, marks a historic step in the evolution of social clauses mirroring progressive FTAs being negotiated in other parts of the world, such as the revised Canada-Chile agreement.

In terms of procedural commitments, TSD chapters provide consultative mechanisms that promote 'dialogue and cooperation between the parties, transparency in introducing new labour standards measures, monitoring and review of the sustainability impacts of the agreement and a commitment to upholding levels of domestic labour protection'.<sup>74</sup> The monitoring of implementation and enforcement of the TSD Chapter is generally overseen by a civil society mechanism that may take the form of a Domestic Advisory Group (DAG) and a panel of experts that can examine any complaint and make recommendations to the parties.<sup>75</sup> While new-generation FTAs refer to the ILO's Decent Work Agenda and core labour standards, the ILO conceives of its role in monitoring labour provision in FTAs as a passive one, offering technical assistance and expertise where needed to ensure coherence between national labour standards, labour provisions in FTAs and multilateral obligations.<sup>76</sup> Strictly speaking, labour standards in FTAs are legally binding, although the enforcement mechanisms through which alleged labour standard violations can be scrutinised are not as strong as those applying to other parts of a FTA. The implications of weak enforcement will be considered in more detail later in this article.

<sup>69</sup>For a rich history of the 'surprising' rise of labour standards in EU-FTAs, see van den Putte and Orbie (n 71).

<sup>70</sup>Art 13.4.3 recognises the following rights as fundamental: (a) freedom of association and the effective recognition of the right to collective bargaining; (b) the elimination of all forms of forced or compulsory labour; (c) the effective abolition of child labour; and (d) the elimination of discrimination in respect of employment and occupation.

<sup>71</sup>Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and the Republic of Moldova, of the other part OJ L 260/4 provisionally applied 1 September 2014 and entered into force 1 July 2016 (EU-Moldova DCFTA); Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Georgia, of the other part provisionally applied 1 September 2014 and entered into force on 1 July 2016; Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and the Ukraine, of the other part OJ L 161/3 signed on 27 June 2014 and entered into force on 1 September 2017 (EU-Ukraine DCFTA). Parts of the EU-Ukraine DCFTA were provisionally applied since 1 November 2014. References to labour standards in these FTAs can be found in arts 364–365 EU-Moldova DCFTA, arts 228–229 EU-Georgia DCFTA, and art 290–291 EU-Ukraine DCFTA.

<sup>72</sup>J Harrison, M Barbu, L Campling, B Richardson and A Smith, 'Governing Labour Standards through Free Trade Agreements: Limits of the European Union's Trade and Sustainable Development Chapters' (2018) *JCMS* 1–18, DOI: 10.1111/jcms.12715.

<sup>73</sup>L Bartels, 'Human Rights and Sustainable Development Obligations in EU Free Trade Agreements' (2012) *University of Cambridge Legal Studies Research Paper Series* No 24/2012, 12.

<sup>74</sup>Harrison et al. (n 77) 2.

<sup>75</sup>An exception to this type of arrangement is the EU–CARIFORUM Economic Partnership Agreement for which the implementation of the entire agreement is overseen by the civil society mechanism. See: Economic Partnership Agreement between the CARIFORUM States, of the one part, and the European Community and its Member States, of the other part concluded on 15 October 2008, OJ L 289/1/3, provisionally applied from 29 December 2008.

<sup>76</sup>International Labour Organisation, 'Labour-Related Provisions in Trade Agreements: Recent Trends and Relevance to the ILO' 29 September 2016 GB.328/POL/3.

### 3.2. Sustainable development

While the EU-Hungary Europe Agreement<sup>77</sup> was the first EU trade agreement to make reference to the principle of sustainable development, the negotiation of the EU-Korea FTA in 2011 saw a further shift in EU external trade policy with the inclusion of a TSD Chapter. A standard iteration of the objective of such a chapter is found in Article 13.1.2 of the EU-Korea FTA:

The Parties *recognise* that economic development, social development, and environmental protection are interdependent and mutually reinforcing components of sustainable development. They underline the benefit of cooperation on trade-related social and environmental issues as part of a global approach to trade and sustainable development.

To date, the EU-CARIFORUM Economic Partnership Agreement is the most far-reaching of any EU FTA in terms of the parties' sustainable development obligations, and the Trade and Development Committee can consider sustainable development issues beyond those contained in the TSD Chapter.<sup>78</sup>

However, the legal effect of such clauses appears to be that they are non-justiciable and difficult to enforce in practice. The language used in relation to the pursuit of sustainable development is often too imprecise to ever render the EU, or indeed the other party, accountable for a violation of its terms. The ambiguity of the language and the vagueness of the obligation – if there can be said to be any obligation at all – that is imposed upon the parties renders such clauses practically redundant. While the vagueness of legal language can expand freedoms and entitlements, it can also limit them. Legal criteria can be 'so vague that they in fact merely legitimise the EU institution with the competence to "apply" them'.<sup>79</sup> Sustainable development is often presented as an 'overarching objective' of EU FTAs to be 'integrated and reflected at every level' of the trade agreement.<sup>80</sup>

While there is an international human right to development codified in Article 1 of the UN Declaration on the Right to Development,<sup>81</sup> the legal status of the right to development has been the subject of debate for some time.<sup>82</sup> The Declaration itself is not legally binding, but the core principles of the right to development find their expression in legally binding instruments in international law. Under international law, 'sustainable development' does not have the character of a peremptory norm and while there is disagreement about how this norm should be categorised, there is some agreement among scholars that sustainable development constitutes, at most, a 'principle' of international law<sup>83</sup> or an 'interstitial norm'<sup>84</sup>

<sup>77</sup> Art 70(2) of Title V 'Economic Cooperation' provides that 'Policies designed to bring about the economic and social development of Hungary ... should be guided by the principle of sustainable development. This entails ensuring that environmental considerations are fully incorporated into such policies from the outset'. EU-Hungary Europe Agreement [1993] OJ L347/2.

<sup>78</sup> The sustainable development obligations also extend to provisions governing investment, trade in services, and e-commerce under Title II of the Agreement and other trade-related issues under Title IV of the Agreement, including intellectual property and technological innovation.

<sup>79</sup> P Leino, 'Politics, Power, and Good Intentions in the EU Development Policy' in N Ferreira and D Kostakopoulous (eds), *The Human Face of the European Union: Are EU Law and Policy Humane Enough?* (CUP 2016) 391.

<sup>80</sup> For example, EU-Korea FTA art 1.2(g) provides that one of the 'objectives' of the FTA is 'to commit, in the recognition that sustainable development is an overarching objective, to the development of international trade in such a way as to contribute to the objective of sustainable development and strive to ensure that this objective is integrated and reflected at every level of the Parties' trade relationship'.

<sup>81</sup> Art 1 provides that the 'right to development is an inalienable human right by virtue of which every human person are entitled to participate in, to contribute to, and enjoy economic, social, cultural, and political development, in which all human rights and fundamental freedoms can be fully realised'. However, promoting the right to development 'cannot justify the denial of other human rights and fundamental freedoms'.

<sup>82</sup> See P Alston, 'Making Space for New Human Rights: The Case of the Right to Development' (1988) 1(3) *Harvard Human Rights Year Book* 3; H Charlesworth, 'The Public/Private Distinction and the Right to Development in International Law' (1988–1989) 12 *Australian Yearbook of International Law* 190; S Marks, 'The Human Right to Development: between Rhetoric and Reality' (2004) 17 *Harvard Human Rights Journal* 137; A Sengputa, 'The Human Right to Development' (2004) 32(2) *Oxford Development Studies* 179; M Nussbaum, *Creating Capabilities: The Human Development Approach* (Harvard, Harvard University Press 2011).

<sup>83</sup> *Gabčíkovo-Nagymaros (Czechoslovakia v Hungary)*, Judgment of 25 September 1997, Separate Opinion of Vice-President of the ICJ, Judge Weeramantry, ICJ Reports 1997, para 85.

<sup>84</sup> V Lowe, 'Sustainable Development and Unsustainable Arguments' in A Boyle and D Freestone (eds), *International Law*

that may modify the character of other norms. The opportunity to clarify the contested normative status of sustainable development has arisen in the judgments of the International Court of Justice (ICJ) and the reports of the WTO's Dispute Settlement Body (DSB). Although the ICJ defines sustainable development as a 'mere concept'<sup>85</sup> to which no legality attaches, it has nevertheless identified this concept as one that can serve as an important hermeneutic tool in the process of judicial reasoning.<sup>86</sup> Furthermore, the DSB has found that the concept of sustainable development adds 'colour, texture, and shading' to the Appellate Body's interpretive process.<sup>87</sup>

That sustainable development finds its expression in so many legally binding documents and in the judgments of the ICJ and recommendations of the WTO's Appellate Body and Panel reports may, at the very least, reflect common sense among the international community that sustainable development is *relevant* to the interpretation of international legal norms. Indeed, the ICJ has recognised sustainable development as a current principle of general international law that requires 'the integration of appropriate environmental measures in the design and implementation of economic development activities'.<sup>88</sup> While sustainable development appears to have garnered its status as a powerful interpretive mechanism for judicial bodies, its quantitative role in the implementation of international legal rules has been minimal.<sup>89</sup> Nevertheless, the interpretive function of sustainable development serves as a tool to refashion traditional legal concepts, albeit incrementally. Similarly, the practice of the CJEU suggests that the concept of sustainable development is best understood as a matrix to which other normative values, such as human rights, may attach.

### 3.3. Territorial extension of social norms?

Beyond the context of FTAs, there are some measures relating to sustainable development that have been found to have extraterritorial effects. Joanne Scott has persuasively argued that the EU is increasingly using the mechanism of 'territorial extension' to expand its regulatory reach. Territorial extension arises when the application of a measure 'depends upon the existence of a relevant territorial connection, but where the relevant regulatory determination will be shaped as a matter of law, by conduct or circumstances abroad'.<sup>90</sup> The CJEU has applied territorial extension in a number of limited environmental contexts, including the regulation of carbon emissions,<sup>91</sup> the environment, fisheries and animal welfare.<sup>92</sup> Through territorial extension, the slow creep of the EU's global regulatory reach – particularly in the context of regulating the environment and sustainable development – becomes more pervasive.

In *Zuchtvieh*,<sup>93</sup> a case concerning animal welfare, the Court was asked to examine the scope of Regulation 1/2005 relating to the EU's regulatory scheme for the transport of animals within its territory. The Court found that where the transport begins in an EU Member State the regulatory framework applies to the entire journey, including transit outside the EU.<sup>94</sup> In effect, this extends the EU's regulatory reach beyond its own territory to any third country through which transit might take place. Advocate General Bot, in his adjoining Opinion, cautioned against such an interpretation and instead found that the language of Regulation 1/2005 was 'unambiguous', applying only to transport starting in and taking place in an EU

and Sustainable Development: Past Achievements and Future Challenges (Oxford University Press 1999) 21.

<sup>85</sup> *Gabčíkovo-Nagymaros (Czechoslovakia v Hungary)*, Judgment of 25 September 1997, ICJ Reports 1997, para 140.

<sup>86</sup> *Pulp Mills on the River Uruguay (Argentina v Uruguay)*, Judgment of 20 April 2010, ICJ Reports 2010, para 31.

<sup>87</sup> *United States-Import Prohibitions of Certain Shrimp and Shrimp Products*, Report of the Appellate Body WT/DS58/AB/R (12 October 1998), para 155.

<sup>88</sup> *Award in the Arbitration regarding the Iron Rhine ('Ijzeren Rijn') Railway between the Kingdom of Belgium and the Kingdom of the Netherlands*, 27 RIAA (2005) 35, para 59.

<sup>89</sup> See V Barral, 'Sustainable Development in International Law: Nature and Operation of an Evolutive Legal Norm' (2012) 23 *EJIL* 398; C Gammage, *North-South Regional Trade Agreements as Legal Regimes* (Edward Elgar 2017) Chapter 4.

<sup>90</sup> J Scott, 'Extraterritoriality and Territorial Extension in EU Law' (2014) 62(1) *American Journal of Comparative Law* 9090.

<sup>91</sup> Case C-366/10 *Air Transport Association of America and others v Secretary of State for Energy and Climate Change* ECLI:EU:C:2011:864.

<sup>92</sup> Case C-424/13 *Zuchtvieh-Export GmbH v Stadt Kempten* [2015] ECLI:EU:C:2015:259.

<sup>93</sup> *ibid.*

<sup>94</sup> In paragraph 47 the Court states that Regulation 1/2005 'does not subject the transport of animals with a point of departure within the territory of the European Union and a destination in a third country to any particular approval scheme, different from that applicable to the transport taking place within the European Union'.



Member State.<sup>95</sup> Contrary to the judgment of the Court, the Advocate General stated that there was a clear intention expressed by the EU legislature ‘to confine the scope *ratione loci* of Regulation 1/2005 to the territory of the EU’ and that to find otherwise would be beyond the authority of the Court.<sup>96</sup>

Another notable case relating to climate change concerned the territorial extension of the EU’s carbon emissions trading scheme in the context of aviation. In the case of *Air Transport Association of America (ATA)*,<sup>97</sup> the EU sought to extend the reach of its environmental policy enshrined in Directive 2008/101 to all planes that land in EU territory. The legitimacy of this law was contested on two grounds, namely that it constituted a discriminatory trade measure and violated the principle of sovereignty protected under the Chicago Convention.<sup>98</sup> Both American and Canadian aviation operators argued that the EU’s law on carbon trading should be limited to EU territory and to find otherwise would constitute a violation of international law. One further objection was raised about the introduction of the EU’s scheme as a unilateral measure and it was submitted that such a scheme should be introduced in a multilateral forum, such as the International Civil Aviation Organisation (ICAO).

In relation to the first point and adopting an ‘economic logic’<sup>99</sup> to its judgment, the CJEU found that the emissions trading scheme was applied uniformly to all aircraft operators on all routes departing from or arriving at an aerodrome situated in an EU Member State.<sup>100</sup> As such, there was no discriminatory treatment. After assessing the extent to which this measure constituted an infringement of the Chicago Convention, the CJEU found that the EU had not applied Directive 2008/101 extraterritorially. Rather, and as stated in the adjoining Opinion of Advocate General Kokott, the territorial extension of this measure:

reflects the nature as well as the spirit and purpose of environmental protection and climate change. It is well known that air pollution knows no boundaries and that greenhouse gases contribute toward climate change worldwide irrespective of where they are emitted.<sup>101</sup>

In the context of environmental conservation, the approach of the CJEU in *ATA* reflects the principles espoused in earlier judgments relating to fisheries<sup>102</sup> and the waste management of an oil spillage that occurred within the exclusive economic zone of an EU Member State.<sup>103</sup> Whether the findings of the CJEU on these matters of territorial extension are correct and legitimate is questionable, but collectively these judgments illustrate a willingness on the part of the Court to extend the regulatory reach of certain EU measures that aim to further the objective of sustainable development to non-Member States through the mechanism of territorial extension. Thus, while sustainable development obligations in FTAs may appear to lack legally binding status, they may not be as imprecise in their scope as previously thought.

#### 4. The exclusion of human rights and social norms in EU FTAs?

The preceding analysis has demonstrated that the state-centric nature of international law can have profound implications for the protection of individual human rights in transnational economic law and specifically through FTAs. Although the scope of trade liberalisation is tailored to the parties under each agreement, the commitment to maintaining *de minimis* standards in relation to human rights and social norms is common to all types of EU FTAs. However, the standard clause adopted in many FTAs provides that the agreement shall not be ‘construed as conferring rights or obligations’ on individuals ‘other than

<sup>95</sup>Case C-424/13 *Zuchtvieh-Export GmbH v Stadt Kempten* [2015] Opinion of Advocate General Bot ECLI:EU:C:2015:259, para 47.

<sup>96</sup>*ibid*, paras 94–95.

<sup>97</sup>Case C-366/10 (n 95).

<sup>98</sup>International Civil Aviation Organisation, Convention on Civil Aviation (the Chicago Convention) of 7 December 1944 (1994) 15 U.N.T.S. 295. The Chicago Convention entered into force in 1947 and now has 191 signatories. The EU is not party to the Chicago Convention.

<sup>99</sup>Case C-366/10 (n 95), para 140.

<sup>100</sup>*ibid*, para 155.

<sup>101</sup>*ibid*, Opinion of Advocate General Kokott, para 154

<sup>102</sup>Case C-286/90 *Anklagemyndigheden v Michael Poulsen & Diva Navigation Corp* [1992] I-06019.

<sup>103</sup>Case C-188/07 *Commune de Mesquer v Total France SA and Total International Ltd* [2008] I-04501.



those created under public international law'.<sup>104</sup> Each FTA contains a system for dispute settlement for an alleged breach of the agreement, unless there is an express clause to the contrary that excludes that part of the agreement from dispute settlement. Dispute settlement frameworks exist within each FTA to govern a dispute relating to the alleged infringement of a trade liberalisation clause, and recourse to the WTO's dispute settlement is available should the parties choose to pursue a remedy at the multilateral level. A comparative analysis of some of the EU's FTAs and association agreements reveals that there is no standard approach adopted in relation to excluding rights,<sup>105</sup> but human rights and social norms are generally excluded from the ordinary dispute settlement mechanism.

Similarly, recourse to the CJEU seems highly improbable in the context of FTAs since the measures do not confer individual rights that are justiciable before the Court. Even where a clause is found to confer an individual right or where the measure is found to fall within an EU policy that has extraterritorial effect, the individual must prove that they have standing before the CJEU in order to bring a claim.<sup>106</sup> Satisfying the threshold of standing under Article 263 TFEU has proven to be a significant obstacle for persons seeking redress for alleged violations of international law and EU law committed by the EU's institutions, as evidenced in the *Front Polisario* case.<sup>107</sup>

Rather, the dispute settlement process for the enforcement of human rights and social norms is usually one of political dialogue as opposed to arbitration. Human rights are governed by the essential elements clause, which is now commonplace in the EU's FTAs. The essential elements clause is complemented by a non-execution clause, which allows the parties to suspend concessions and take 'appropriate measures' where a breach of the essential elements clause arises. However, the EU has taken 'appropriate measures' in only a small number of cases.<sup>108</sup> When comparing the human rights clause with other social norms in EU FTAs, there appears to be a difference in the nature of their enforceability. Bartels argues that 'despite certain infelicities in wording, the human rights clause is sufficiently robust and flexible to enable the EU to ensure that it can withdraw from any commitment that would imperil its obligation to respect human rights and democratic principles in its external relations'.<sup>109</sup> However, there is less certainty regarding the EU's obligations under the TSD Chapter.

<sup>104</sup>Such clauses can be found in art 336 of the EU Colombia–Peru FTA and art 356 of the Central American Association Agreement, for example. See: Trade Agreement between the European Union and its Member States, of the one part, and Colombia and Peru, of the other part OJ L 354, signed on 26 June 2012 and provisionally applied between the EU and Peru from 1 March 2013 and between the EU and Colombia since 1 August 2013; Agreement establishing an Association between the European Union and its Member States, on the one hand, and Central America on the other OJ L 346 (15 December 2012) signed on 29 June 2012 and provisionally applied between the EU, Nicaragua, Honduras and Panama since 1 August 2013 and between those parties and El Salvador and Costa Rica since 1 October 2013.

<sup>105</sup>A high standard has been adopted in CETA under art 30.61–30.62 CETA, which states: 'Nothing in this Agreement shall be construed as conferring rights or imposing obligations on persons other than those created between the Parties under public international law, nor as permitting this Agreement to be directly invoked in the domestic legal systems of the Parties ... A Party shall not provide for a right of action under its domestic law against the other Party on the ground that a measure of the other Party is inconsistent with this Agreement.'

<sup>106</sup>TFEU art 263 provides that any natural or legal person may bring a claim against the EU or its institutions for an alleged violation of their rights where the measure is of 'direct and individual concern' to the individual. Acts that fall within the scope of TFEU art 263 and the legality of which may be subject to review by the CJEU are restricted to regulatory acts, irrespective of whether such acts require implementing measures, and it does not encompass legislative acts.

<sup>107</sup>See also: Case C-25/62 *Plaumann & Co v Commission of the European Economic Community* EU:C:1963:17, para 30 reiterated in Case C-50/00 *Unión de Pequeños Agricultores v Council* [2002] ECR I-6677, para 36; Case C-583/11 *P, Inuit Tapiriit Kanatami and Others v European Parliament and Council of the European Union* ECLI:EU:C:2013:625 (3 October 2013); Case C-456/13 *P, T & L Sugars Ltd and Sidul Açúcares, Unipessoal Lda v European Commission* ECLI:EU:C:2015:284 (28 April 2015); Joined cases C-408/15 and C-409/15 *P, Ackermann Saatzeucht and Others v Parliament and Council* EU:C:2016:893.

<sup>108</sup>For examples of non-execution clauses, see EU–Moldova Association Agreement arts 422 and 455 and Cotonou Partnership Agreement (CPA) between the EU and African, Caribbean, and Pacific States art 96. Overall, the EU has invoked non-execution clauses in 24 cases. The EU has taken 'appropriate measures' most recently in the context of CPA art 96 in response to the human rights crisis in Burundi.

<sup>109</sup>L Bartels (n 78), 17.

Over time, there has been a shift away from framing labour standards as human rights in EU FTAs toward conceptualising them within the frame of sustainable development. The emphasis in EU FTAs on the ‘soft incentives-based’ approach to the enforcement of labour standards is clear.<sup>110</sup> Through the civil society mechanisms and DAGs, the institutional frameworks in FTAs promote dialogue and cooperation between the parties. However, evidence shows that the effectiveness of institutional governance in this framework has been limited.<sup>111</sup> The creation of the DAG was delayed in the context of the CARIFORUM-EPA, while other trade partners, such as South Korea, have been unresponsive to the recommendations of the civil society mechanisms. Arguably, it is the lack of a robust and formal complaint framework, through which the State must react to the issues raised by the civil society mechanism, that ‘allows the parties to these agreements to remain inactive, even when confronted with allegations of severe labour standards violations’.<sup>112</sup> While the depth and breadth of labour provisions in EU FTAs stand in stark contrast to their weak enforcement mechanisms, the soft incentive-based approach of the EU ‘should not be dismissed as cheap rhetorical commitment’,<sup>113</sup> since certain labour standards – especially core labour standards – could be protected under the essential elements clause. It should be recalled, however, that Article 21 TEU treats all human rights as ‘indivisible’ and conferring different treatment to rights draws into question the legitimacy of the categorisation of rights in EU FTAs.

Those social norms contained in the TSD chapters and which are couched in imprecise and conditional terms (e.g. sustainable development) are in effect excluded from enforcement as they are not legally binding on the parties in a meaningful way. This is perhaps unsurprising and a comparison can be drawn with the rules at the multilateral level. Referring to the inclusion of social objectives at the WTO, Martti Koskeniemi noted that ‘though both free trade and social regulatory objectives are written into the WTO treaties, the former are always taken as the starting-point, while the latter have to struggle for limited realisation’.<sup>114</sup> The struggle for realisation is insurmountable in the FTA context since certain normative entitlements may be explicitly excluded by a clause in the FTA or in a statement contained in the adjoining Council Declaration to the FTA.<sup>115</sup>

However, in assessing the justiciability of provisions relating to sustainable development, it should be noted that some countries, including Bolivia and Ecuador, have recognised the right of nature as a legally protected constitutional right. Article 71 of the Constitution of Ecuador (2008) provides that ‘all persons, communities, peoples, and nations can call upon public authorities to enforce the rights of nature’, while Article 108.16 of the Constitution of the Plurinational State of Bolivia (2009) states that all Bolivian citizens have a duty to ‘protect and defend an adequate environment for the development of living beings’.<sup>116</sup> The EU-MERCOSUR Association Agreement currently under negotiation in 2018 may present an opportunity to examine the obligations of the EU in relation to sustainable development, although the extent to which the constitutional protection of rights of nature will alter the legal effect of social norms in this FTA remains uncertain.

#### 4.1. Why include human rights and social norms in FTAs?

If it is the case that such clauses lack legal certainty or, where they are legally binding, are unlikely in practice to be enforceable, it may seem curious that the parties agree to the inclusion of such clauses in EU FTAs. Is the commitment to human rights and social norms merely window dressing and is the

<sup>110</sup>Van den Putte and Orbie (n 71) 270.

<sup>111</sup>F Ebert, ‘Labour Provisions in EU Trade Agreements; What Potential for Channelling Labour Standards-Related Capacity Building?’ (2016) 155(3) *International Labour Review* 407.

<sup>112</sup>ibid, 413.

<sup>113</sup>Van den Putte and Orbie, (n 71) 269.

<sup>114</sup>M Koskeniemi, *From Apology to Utopia: The Structure of International Legal Argument* (CUP 2005) 607.

<sup>115</sup>For example, see Decision annexed to the Agreement: European Council, ‘International Agreements’, Council Decision of 16 September 2010 on the signing, on behalf of the European Union, and the provisional application of the Free Trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part (2011/265/EU) O.J. L127/1. Art 8 provides that ‘The Agreement shall not be construed as conferring rights or imposing obligations which can be directly invoked before Union or Member State courts and tribunals.’

<sup>116</sup>For an interesting account of the rights of nature, see: D Humphreys, ‘Know Your Rights: Earth Jurisprudence and Environmental Politics’ (2015) 10(3) *International Journal of Sustainability Policy and Practice* 1.

social ambition of the EU more than rhetorical? While *a priori* it is not to be assumed that integration through FTAs will necessarily result in the harmonisation of public goods across transnational spaces,<sup>117</sup> the EU appears to proceed on the basis that regionalism will lead to greater coherence or an ideational ‘discursive fit’<sup>118</sup> among trade partners on matters of trade and social norms alike. Arguably, the inclusion of a social chapter in an FTA increases the likelihood of buy-in from citizens and serves to counterbalance extensive market provisions.<sup>119</sup> A survey of the scope of FTAs recently concluded by the EU supports the proposition that embedding universal values into FTAs is unlikely to be contested where there is a high degree of ‘resonance’ or a ‘discursive fit’ between the normative and ethical positions of the parties. However, in some instances where the trade partner expresses a lack of resonance with the EU’s values, the EU has been willing to curtail its missionary objectives under Article 21 TEU in favour of advancing its commercial interests.<sup>120</sup> The recently concluded EU-Singapore agreement provides a good illustration of how commercial interests may trump social interests in the FTA context.

Chapter 15 of the EU-Singapore FTA (EUSFTA) establishes a dispute settlement procedure modelled on the WTO dispute settlement system. Under this framework, the parties to the FTA are encouraged to settle any dispute through a consultative process,<sup>121</sup> but where this cannot be achieved they may seek recourse to the arbitration panel.<sup>122</sup> The decision of the arbitration panel is binding on the parties,<sup>123</sup> and they should take the necessary measures ‘to comply in good faith’<sup>124</sup> with that ruling. Failure to comply with the ruling may enable the injured party to adopt a countermeasure or suspend obligations.<sup>125</sup> However, the dispute settlement system does not cover every aspect of the FTA. Provisions relating to sustainable development set out in Chapter 13, entitled Trade and Sustainable Development, are expressly excluded<sup>126</sup> from the arbitration procedures established under Chapter 15.

Furthermore, the EUSFTA illustrates the incommensurability between the ethical perspectives of the EU and Singapore on human rights and, in particular, the death penalty. Lachlan McKenzie and Katharina Meissner found that the Singaporean government ‘was opposed to the *symbolic gesture* of signing an agreement that would imply a change in the position on the death penalty, human rights or governance’.<sup>127</sup> Conditionality had the potential to act as a source of conflict between the two parties, and there were concerns that Singapore may be required to compromise its domestic policy to satisfy the requirements of conditionality. As the EUSFTA was being negotiated to secure trade ties between the two parties, another complementary agreement, the EU-Singapore Partnership and Cooperation Agreement (EUSPCA), which focuses on cooperation in the fields of education, transport, energy, science and technology, was being negotiated. To avoid conflict in the EUSFTA negotiations, a ‘side letter’ was annexed to the EUSPCA, and forms part of the agreement, and confirms that the parties were not aware ‘of any of each other’s domestic laws or their application, which could lead to the invocation of the non-execution mechanism’.<sup>128</sup>

There is evidence to suggest that the extent to which an EU FTA embeds the founding values of the Union hinges on the priorities advanced by the EU institutions negotiating the agreement, with the European Parliament playing a more interventionist role in promoting rights than the Commission.<sup>129</sup>

<sup>117</sup>A Casella and JS Feinstein, ‘Public Goods in Trade: On the Formation of Markets and Jurisdictions’ (2002) 43(2) *International Economic Review* 437.

<sup>118</sup>T Hopf, ‘Common-Sense Constructivism and Hegemony in World Politics’ (2013) 67 *International Organisation* 317.

<sup>119</sup>Van den Putte and Orbie, (n 71) 280.

<sup>120</sup>L McKenzie and KL Meissner, ‘Human Rights Conditionality in European Union Trade Negotiations: The Case of the EU-Singapore FTA’ (2017) 55 *JCMS* 837.

<sup>121</sup>EU-Singapore Free Trade Agreement initialled May 2015, art 15.3, Chapter 15.

<sup>122</sup>*ibid*, Section C.

<sup>123</sup>*ibid*, art 15.19.

<sup>124</sup>*ibid*.

<sup>125</sup>*ibid*, art 15.12.

<sup>126</sup>EUSFTA (n 125) art 13.16, Chapter 13.

<sup>127</sup>McKenzie and Meissner (n 126) 840.

<sup>128</sup>Proposal for a Council Decision on the Signing on behalf of the Union, of the Partnership and Cooperation Agreement between the European Union and its Member States, of the one part, and the Republic of Singapore, of the other part, COM (2014) 70 final, dated 17 February 2014.

<sup>129</sup>Insight from the EU-Vietnam negotiations demonstrates the often-conflicting preferences of EU institutions. See D Sicurelli, ‘The EU as a Promoter of Human Rights in Bilateral Trade Agreements: The Case of Negotiations with Vietnam’ (2015) 11(2)

McKenzie and Meissner have identified the shifting ideational base of DG Trade from ‘the trade development nexus towards the growth agenda that prioritises commercial interests’.<sup>130</sup> This paradigmatic shift is certainly apparent in the recent mid-term review<sup>131</sup> of the *Trade for All* strategy, which outlines the EU’s commitment ‘to a rules-based multilateral trading system that underpins our [EU] prosperity’ and seeks to shape globalisation in line with ‘the shared interests and values’ of the EU.<sup>132</sup> The negotiations between the EU and Singapore reveals a tension between the EU’s desire to foster good economic relations with emerging economies and the Asian countries’ ‘systematic rejection’ of social clauses within FTAs.<sup>133</sup> Here, there appears to be a lack of resonance in the ideational or normative approaches of the regions. It is the EU’s ‘carrot-and-stick’ approach to trade that often encompasses an element of conditionality for developing countries, which has proven unfavourable with many of its Asian partners. Nevertheless, there is an argument to be made that the inclusion of human rights and social norms within FTAs, even with their ‘softer’ enforcement mechanisms, may enable the EU to become ‘an effective standard setter in the long-run’.<sup>134</sup> This alone may serve as a sufficient normative basis for the EU to insist on the inclusion of such clauses within FTAs.

## 5. An obligation to pursue ‘development-friendly’ trade?

The preceding analysis acknowledges that there are notable limitations to the territorial reach of EU law in relation to human rights clauses and social norms in EU FTAs. While the focus of this article has been on the EU as a market actor and normative actor, it is important to acknowledge that the EU is also emerging as a significant development actor. As the world’s largest provider of development funding, development policy has a significant place in the EU’s external action. This section concludes the analysis by examining the extent to which, notwithstanding the limitations of extraterritoriality discussed above, the EU is under an obligation to conduct its external policies in a manner that is ‘development-friendly’. If such an obligation does exist, this could have profound implications for the EU’s future trade agreements, particularly with developing countries.

While the EU does not define the term ‘development-friendly’, it referred to this concept in its 2015 Report on Policy Coherence for Development (PCD).<sup>135</sup> It states that making FTAs development-friendly is based on three particular aspects: providing support to developing countries for the negotiation and implementation of agreements to which they are party; ensuring a pro-development content of agreements the EU negotiates with developing countries; and needing to take into account the specific needs of individual developing countries when negotiating FTAs to ‘prevent risks or seize opportunities’. The Commission does not elaborate on what constitutes ‘pro-development content’, although in the context of the Economic Partnership Agreements, the Commission has identified longer transition periods, asymmetric liberalisation, special safeguard mechanisms and other principles of special and differential treatment as constituting pro-development content.

In the context of external relations and trade, the European Consensus on Development (2017) provides that the EU will ‘continue through its trade policy to ensure that developing countries, particularly the most vulnerable, reap the benefits of inclusive growth and sustainable development from enhanced

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<sup>130</sup> McKenzie and Meissner, (n 126).

<sup>131</sup> Commission (n11).

<sup>132</sup> Prioritising commercial values is also evident in the ‘Global Europe’ agenda. See G Siles-Brügge, ‘EU Trade and Development Policy Beyond the ACP: Subordinating Developmental to Commercial Imperatives in the Reform of GSP’ (2014) 20 *Contemporary Politics* 49.

<sup>133</sup> M Garcia and A Masselot, ‘EU-Asia Free Trade Agreements as Tools for Social Norm/Legislation Transfer’ (2015) 13 *Asia Europe Journal* 241

<sup>134</sup> Van den Putte and Orbie (n 71) 271.

<sup>135</sup> Since 2005, and through the principle of PCD, development objectives are to be embedded across all aspects of the Union’s external action as expressed in constitutive legal texts, policy frameworks and financing instruments. Development objectives were first codified into primary law in the Maastricht Treaty (1992) and most recently in TFEU art 208. As a legal obligation, TFEU art 208 identifies the ‘primary objective’ of development cooperation to be poverty reduction and provides that EU measures should adhere to internationally recognised commitments on development, such as the Millennium Development Goals (MDGs) and, more recently, the Sustainable Development Goals (SDGs).



participation in regional integration and the multilateral trading system'. On this basis, it is argued that the EU's obligation to avoid contributing to human rights violations extraterritorially is leading to a policy of 'development-friendly' trade. Cases relating to the scope of mixed agreements, which involve the shared competences of the EU and its Member States, best illustrate the extent to which a norm of 'development-friendly trade' is emerging.

Mixed agreements may have a number of legal bases, such as Article 207 TFEU (common commercial policy), Article 100 TFEU (transport), Article 191 TFEU (environment) and so forth. Where the mixed agreement incorporates development cooperation, the legal bases of Articles 208–211 TFEU may be relied on, although Article 4(4) TFEU clearly states that the exercise of EU competence in relation to development cooperation shall not prevent the Member States from exercising their competence in this field. Article 208 TFEU sets out the Union's policy on development cooperation and can be divided into two limbs. The first limb of Article 208 TFEU provides that the objectives of development cooperation 'shall be conducted within the framework of principles and objectives of the Union's external action', thus making the link with Article 21 TEU explicit. The first limb is defined by Panos Koutrakos as the 'inclusive' dimension of Article 208, since it 'establishes a bridge between development cooperation and the objectives governing all the other external policies of the Union'. However, he also identifies an 'exclusive' dimension to Article 208 in the second limb of the provision, which states:

Union development cooperation policy shall have as its primary objective the reduction, and in the long term, the eradication of poverty. The Union shall take account of the objectives of development cooperation in the policies that it implements which are likely to affect developing countries.

As the emphasis is placed on poverty reduction as the primary aim of development cooperation, it can be inferred that any other objective falling under Article 21(2) TEU promoting development will be secondary or 'incidental' unless it pursues the primary aim of poverty reduction. Consequently, the 'exclusive' dimension to Article 208 TFEU 'rules out reliance on Articles 208–211 TFEU for measures mainly concerned with objectives other than the fight against poverty'.<sup>136</sup> If one reads the inclusive and exclusive dimensions together, the effect of Article 208 TFEU is not unfettered in its application. While it reinforces the broad notion of development expressed in EU policy and law, it serves to delimit the extent to which the rules relating to development cooperation can be applied to measures pursuing other primary aims, like that of the Common Foreign and Security Policy. However, it is submitted that the rules and procedures relating to development could fall generally within the common commercial policy (Article 207 TFEU) where such measures are found to be pursuing the primary aim of poverty reduction. Certainly, in the context of EU FTAs that promote trade liberalisation and development cooperation, it seems likely that Article 207 TFEU would be read in the light of Article 208 TFEU and Article 21 TEU, in other words, the objectives of the common commercial policy and development cooperation policy dovetail with the objectives of the EU's external action.

### 5.1. The EU-Philippines agreement

The relationship between trade and development was examined in the case of *Commission v Council*<sup>137</sup> which examined the scope of the EU-Philippines Partnership Cooperation Agreement (PCA). This case concerned a challenge by the European Commission, which asserted that the Council had added a number of incorrect legal bases to the PCA. The Commission argued that the agreement was based on Article 207 TFEU and Article 209 TFEU in conjunction with Article 218(5) TFEU, while the Council asserted that additional legal bases were required for those aspects of the agreement relating to the exclusive competence of the Member States (migration, transport and the environment). There appeared to be many aspects to the agreement, not merely development cooperation, and as the EU and a developing country had negotiated the PCA, the CJEU was asked to clarify the character of the agreement. Consisting of 58 provisions, the PCA contained only one provision relating explicitly to development cooperation

<sup>136</sup>P Koutrakos, *The EU Common Security and Defence Policy* (Oxford, OUP 2013) 212.

<sup>137</sup>Case C-377/12 *Commission v Council* [2014] ECLI:EU:C:2014:1903.



(Article 29) and the court was asked to clarify whether the principle of the *Portugal v Council* case<sup>138</sup> applied to those measures that ‘go beyond a general agreement to cooperate’.<sup>139</sup>

Article 29 PCA reiterated that the ‘primary goal of development cooperation is to encourage sustainable development that will contribute to the reduction of poverty and to the attainment of internationally agreed development goals including the Millennium Development Goals’. Article 29 provides that the parties shall cooperate through ‘regular dialogue’ and ‘shall aim at’ promoting various aspects of sustainable development. Such provisions are relatively standard for EU FTAs and the linguistic construction of Article 29 implies a set of non-justiciable objectives that fall outside the scope of legal adjudication given their ‘soft’ nature. Other provisions within the PCA related to development objectives, such as Article 34, which set out obligations and commitments in relation to protection of the environment and of natural resources. Article 34 provided that ‘cooperation in this area shall promote the conservation and improvement of the environment in pursuit of sustainable development’. On interpretation of this part of the PCA, the Commission in its single plea argued that Article 34 in its entirety ‘merely sets out general principles and guidelines on the role that environmental protection should play in the development cooperation of the European Union in respect of the Philippines’.<sup>140</sup> It was, therefore, not necessary to base the PCA, in part, on Article 191(4) TFEU, but rather the correct legal base was Article 209 TFEU (development cooperation).

While the focus of this case turned on the choice of legal base(s) and the scope of the Union’s exclusive competence, what is most interesting for the purposes of this article is the court’s interpretation of development in relation to the EU’s external action. To determine what falls within the broad notion of development, the court referred to the European Consensus on Development (2006)<sup>141</sup> and the financing instrument for development cooperation wherein the development objectives of the Union find their legal expression. Recognising the link between Article 208 TFEU (development cooperation) and Article 21 TEU (external action), the court noted that development cooperation is to be conducted within the framework of principles and objectives arising under Article 21 TEU:

European policy in the field of development cooperation is not limited to measures directly aimed at the eradication of poverty, but also pursues the objectives referred to in Article 21(2) TEU, such as the objective set out in Article 21(2)(d), of fostering the sustainable economic, social, and environmental development of developing countries, with the primary aim of eradicating poverty.<sup>142</sup>

The court interpreted the obligations of the parties on transport, environment and migration with reference to the ‘intention’ of the parties. It found that the term ‘development’ need not be included in the title of an FTA if it can be shown that the promotion of sustainable social and economic development, the eradication of poverty and the attainment of internationally agreed development goals are among the ‘general principles’ of the agreement. It concluded that the expression of development can be affirmed in other provisions and in the context of the PCA ‘in particular to those [provisions] devoted to employment and social affairs, to agriculture, fisheries and rural development, and to regional development’.<sup>143</sup> Establishing the legal test for determining whether a provision contributes to the pursuit of development cooperation, the Court assessed whether the provision contains ‘obligations so extensive that they constitute distinct objectives that are neither secondary nor indirect in relation to the objectives of development cooperation’. Referring to the European Consensus on Development (2006) as a hermeneutic judicial tool, the CJEU adopted an activist interpretative approach to development cooperation and, furthermore, the judgment appears to extend the exclusive competence of the EU to act where the obligation of a measure is ‘neither secondary nor indirect’ to the objectives of development cooperation.

<sup>138</sup>Case C-268/94 *Portugal v Council* [1996] ECR I-6219. See discussion in Section 2.1 above.

<sup>139</sup>Case C-377/12 *Commission v Council* [2014] ECLI:EU:C:2014:1903, para 21.

<sup>140</sup>*Ibid.*

<sup>141</sup>Joint Statement by the Council and the representatives of the governments of the Member States meeting within the Council, the European Parliament and the Commission on European Union Development Policy: ‘The European Consensus’ (2006) 2006/C 46/01.

<sup>142</sup>Case C-377/12 *Commission v Council* [2014] ECLI:EU:C:2014:1903, para 37.

<sup>143</sup>*Ibid.*, para 46.

By adopting this interpretive approach the court has expressed a sensitivity toward the commitment to ‘development-friendly trade’ – at least, the court has done so explicitly in the context of those agreements constituting trade and development agreements. If the reasoning of the court is correct, insofar as it identifies the requirement that development cooperation is framed within the principles and objectives set out in Article 21 TEU, then surely the same must be said for the common commercial policy? To accept this proposition would lead to the conclusion that there is an inextricable link between Article 207 TFEU, Article 208 TFEU and Article 21 TEU – with none of them being secondary or incidental to one another – such that the EU must conduct its common commercial policy in accordance with the objectives guiding its external action. In other words, the territorial reach of EU law may be more expansive than once thought, particularly in the context of trade and development cooperation agreements.

## 6. Conclusion

This article has examined the nature and enforceability of human rights clauses and social norms in EU FTAs to assess the territorial reach of EU law. It has been argued that, while human rights are not an area of exclusive EU competence, the EU may be liable for contributing to human rights violations in the context of international trade. However, the nature of the duty in relation to human rights obligations remains somewhat ambiguous. The *Front Polisario* case has reinforced the procedural significance of conducting an impact assessment prior to the implementation of a trade agreement, but has left unanswered the question of whether the EU institutions are under a ‘weak’ duty to ensure that the trade agreement itself is not a violation of fundamental rights or a ‘strong’ duty to ensure that they do not ‘indirectly encourage’ or ‘benefit from’ violations of fundamental rights on the implementation of the agreement.

Over time, an increasing judicialisation of labour provisions has been observed, with FTAs including different and more effective means for enforcing labour standards in the context of trade. However, the extent to which the EU might be found liable for contributing to the lowering of labour standards hinges on the efficacy of the enforcement mechanism within an FTA, which typically takes the form of a civil society mechanism or DAG. In some instances, there is evidence to suggest that labour standards in the third country have been *lowered* on the implementation of some bilateral agreements, for example in the EU-Colombia FTA<sup>144</sup> and EU-Vietnam FTA.<sup>145</sup> It seems that the enforcement mechanism under the essential elements clause is more robust than the ‘soft incentive-based’ approach for resolving labour standard disputes and the even weaker protection afforded to the objective of sustainable development under the TSD Chapter. However, even though the legal effects of other social norms such as sustainable development may be uncertain, these clauses are ‘not simply a matter of discretionary foreign policy’.<sup>146</sup> While the limitations of the civil society mechanisms and DAGs have been acknowledged, this article does not propose that labour provisions in FTAs should be abandoned. Rather, further research should be carried out into the potential for the alternative functions of labour provisions, such as national capacity-building and the strengthening of dialogue mechanisms to promote compliance.<sup>147</sup>

In part, the purpose of this article has been to problematise the nature and extent of EU obligations in relation to human rights clauses and social norms under EU FTAs to better understand the normative role of the EU in the global economy. The finding that social norms may be effective only through ‘weak’ or ‘soft’ enforcement mechanisms does not necessarily preclude the EU from becoming a global standard-setter. After all, sanctions are not the only way to evince compliance with so-called shared objectives. In practice, it appears that human rights clauses and social norms, which could have a significant bearing on the EU’s policies with extraterritorial effects, are unlikely to be enforced in the context of FTAs. However, the territorial reach of EU law may be extended in the framework of trade and development cooperation agreements if the reasoning of the CJEU in the EU-Philippines case is applied in subsequent cases.

<sup>144</sup> A Marx, B Lein, and N Brando, ‘The Protection of Labour Rights in Trade Agreements: The Case of the EU-Colombia Agreement’ (2016) 50(4) *Journal of World Trade* 587.

<sup>145</sup> Sicurelli (n 135).

<sup>146</sup> Bartels (n 78) 17.

<sup>147</sup> For an excellent account of alternative functions of labour provisions, see F Ebert (n117).

### **Declarations and conflict of interests**

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